

FILED  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF IOWA

APR 14 2004

SEAN F. McAVOY  
CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION

SHARLENE MARIE SEE,  
Debtor-Appellee,  
vs.  
BLUE GRASS SAVINGS BANK,  
Claimant-Appellant.

No. C03-151 LRR

ORDER

This matter is before the court on appeal from Chief Bankruptcy Judge Paul J. Kilburg's November 20, 2003 order denying Appellant Sharlene Marie See's motion under Federal Rule of Civil Procedure 59(e) to alter or amend judgment.

Upon review of the record, the briefs of counsel and attachments thereto and the law, the court finds that oral argument is unnecessary. Moreover, oral argument in this matter would only result in increased expense to the parties and delay in case administration. The court shall therefore decide this matter without oral argument.

***I. STANDARD OF REVIEW***

On appeal from the bankruptcy court, the district court acts as an appellate court and reviews the bankruptcy court's factual findings for clear error and its legal conclusions de novo. *In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 379 (8th Cir. 2000). A bankruptcy court's denial of a motion to alter or amend under Federal Rule of Civil Procedure 59(e) is reviewed for abuse of discretion. *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir. 1988). "A motion to alter or amend judgment cannot be used to raise arguments which could have been raised prior to the issuance of judgment." *Id.* at 414.

## ***II. FACTS***

On December 4, 2002, Claimant-Appellant Blue Grass Savings Bank (the “Bank”) filed a small claims suit against See in the Iowa District Court for Scott County, seeking to recover against See for her failure to repay a loan from the Bank. The Iowa District Court entered judgment against See on February 19, 2003.

To assist in the collection of the judgment against See, the Bank employed David E. Chyma. On April 30, 2003, Chyma provided to the Sheriff of Muscatine County, Iowa, a general execution and “Dictation to Sheriff.” The Dictation to Sheriff, signed by Tim Oetzmann, an officer of the Bank, instructed the sheriff to garnish See’s wages at All Steel, See’s employer. All Steel garnished See’s wages on the following dates in the following amounts:

<u>Date</u>	<u>Amount</u>
May 2, 2003	\$121.25
May 9, 2003	\$106.46
May 22, 2003	\$110.46
May 29, 2003	\$108.83
June 5, 2003	\$107.89 <sup>1</sup>

On May 20, 2003, See filed a Chapter 7 Bankruptcy Petition. Notice of the bankruptcy filing was mailed to Chyma. On the date of See’s bankruptcy filing, See’s wages had already been garnished twice, for a total amount of \$227.71. See listed these garnished wages as an asset in Schedule B of her bankruptcy petition. In Schedule C of her bankruptcy petition, See claimed these garnished wages are exempt pursuant to Iowa Code § 627.6(9).

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<sup>1</sup> All Steel refunded this amount to See.

After filing her bankruptcy petition, See's wages were garnished three more times. On June 3, 2003, See's attorney wrote to the Muscatine County Sheriff, requesting that the garnished wages be returned to See. On June 23, 2003, the Muscatine County Sheriff advised See's attorney that it had forwarded the garnished wages to the Scott County Clerk of Court.

On June 18, 2003, the Bank filed in the Iowa District Court an application to condemn the garnished funds.<sup>2</sup> The application was granted by the Iowa District Court on the same day. Thereafter, the Scott County Clerk of Court sent the garnished wages to the Bank.

On July 2, 2003, See's attorney sent letters to the Bank and to Chyma, requesting that \$447.00, the amount of wages garnished less the amount already refunded by All Steel, be returned to See. Chyma responded by letter dated July 8, 2003, stating:

If you can accurately calculate that portion of the withholdings that were withheld May 20 through May 23, there appears to be no problem releasing this amount upon request. Upon receipt of such, I will so recommend to Blue Grass Savings Bank. Additionally, I have recommended to Blue Grass Savings Bank the release of funds through May 19 to be authorized in compliance with a court order.

See's attorney sent another letter to Chyma on July 14, 2003, advising Chyma that the garnished wages were exempt property and again requesting that \$447.00 be returned to See.

On August 21, 2003, See's attorney filed an application for order for rule to show cause in the Bankruptcy Court for the Northern District of Iowa. The bankruptcy court

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<sup>2</sup>The Bank disputes the bankruptcy court's factual finding that Chyma filed the application to condemn funds. The Bank contends the application was filed by the Scott County Clerk of Court, without Chyma's knowledge or consent.

set a hearing on the application for October 15, 2003. The Bank and Chyma received notice of the hearing, but neither the Bank nor Chyma attended the hearing. On October 28, 2003, the bankruptcy court entered judgment in favor of See. The bankruptcy court found that the Bank violated the automatic stay under 11 U.S.C. § 362(a) by garnishing See's wages post-petition and by condemning the garnished funds. The bankruptcy court awarded damages to See in the amount of \$6,730.79, which includes \$447.00 for the garnished funds, \$174.16 for lost wages and travel expenses, \$1,109.63 for attorney's fees and \$5,000.00 for punitive damages.

On November 7, 2003, the Bank filed a motion to alter or amend the bankruptcy court order on the grounds that the bankruptcy court made manifest errors of fact that warranted the bankruptcy court's reconsideration. The Bank contended that the bankruptcy court erred in awarding actual and punitive damages because neither the Bank nor Chyma willfully violated the automatic stay. The Bank maintained that neither the Bank nor Chyma moved to condemn the garnished funds. The Bank argued that Chyma followed the Scott County Clerk of Court's procedure by submitting – but not filing – an application to condemn funds with the clerk. The Bank insisted it was the action of the Scott County Clerk of Court that resulted in the filing of the application and order to condemn funds. The Bank further argued that the bankruptcy court erred in awarding attorney's fees because “this problem would have been avoided” if See's attorney had notified the Scott County Clerk of Court of the bankruptcy.

By order dated November 20, 2003, the bankruptcy court denied the Bank's motion to alter or amend judgment. The bankruptcy court found that the Bank waived its right to complain about the October 28, 2003 order because although the Bank received notice of the October 15, 2003 hearing, it chose to not appear at the hearing. This appeal followed.

### **III. ANALYSIS**

On appeal, the Bank argues that the bankruptcy court erred by refusing to alter or amend its factual finding that the Bank filed the application to condemn See's garnished wages. The Bank contends that neither the Bank nor Chyma willfully violated the automatic stay, but in fact Chyma took affirmative action to stop the wage garnishment by instructing the Muscatine County Sheriff to cease the wage garnishment. Conversely, See argues that the bankruptcy court's decision should be affirmed because the Bank is using this appeal to introduce new facts that were not presented to the bankruptcy court at the time of the hearing on See's application for order for rule to show cause. In response, the Bank argues that this court should permit the introduction of new facts because Chyma's failure to attend the October 15, 2003 contempt hearing was due to Chyma's "documented confusion as a lay person with respect to the purpose of the October 15, 2003 hearing."

The court finds that the Bank is attempting to advance a new argument based upon the law and facts available at the time of the October 15, 2003 hearing. Despite receiving a copy of See's application for order for rule to show cause, which clearly directed the Bank and Chyma to personally appear "to show cause why they should not be held in contempt," neither the Bank nor Chyma attended the hearing. The court finds that Chyma's excuse for failing to attend the hearing is woefully inadequate. The court recognizes that Chyma is not an attorney, but even an ordinary layman reading the application would not have been confused as to the purpose of the October 15, 2003 hearing. The bankruptcy court correctly held that Federal Rule of Civil Procedure 59(e) is not a vehicle for presenting evidence and argument which could have been presented at the original hearing. *See In re Hupton*, 287 B.R. 438, 445 (Bankr. N.D. Iowa 2002). Based on a review of the record as a whole, the court finds that the bankruptcy court's decision is well grounded in the record and supported by the law. The court therefore

holds that the bankruptcy court neither committed reversible error nor abused its discretion in denying the Bank's motion to alter or amend.

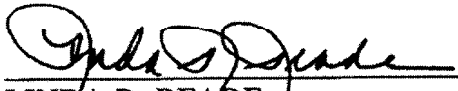
***IV. CONCLUSION***

IT IS ORDERED that:

1. The bankruptcy court's November 7, 2003 order denying the Bank's motion to alter or amend is AFFIRMED.

2. The hearing scheduled for April 22, 2004 is canceled.

SO ORDERED this 14<sup>th</sup> day of April, 2004.

  
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LINDA R. READE  
JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA